United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-1493

United States Court of Appeals
FOR THE SECOND CIRCUIT

In the Matter
of
R. HOE & CO., INC.,
Debtor.

In Proceedings for the Reorganization of a Corporation

ABARTA CORP. (d/b/a PRESS PUBLISHING CO.),
Claimant-Appellant,
against
JAMES B. KILSHEIMER, III and
ROBERT M. CORRAO, as Trustees,
Appellees.

On Appeal from the United States District Court
For the Southern District of New York

APPELLANT'S REPLY BRIEF

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Preliminary Statement

This memorandum is submitted on behalf of claimant Abarta Corp. (d/b/a Press Publishing Co.) (hereinafter referred to as "Claimant") in reply to the "Brief on Behalf of Appellees" heretofore submitted by the Trustee.*

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* Although there are now two trustees of the debtor, for convenience sake, the Appellees will be referred to throughout this brief as the "Trustee".

As will be demonstrated below, the Trustee has utterly failed to meet Claimant's demonstration that its claim should be allowed.

ARGUMENT

Replying to the Trustee's Brief re Claimant's.

POINT I

The failure and refusal of the debtor and its Trustee to deliver the press ordered by Claimant at the original contract price was a breach of contract entitling Claimant to damages.

In Claimant's original brief herein (hereinafter "Claimant's Main Brief") (pp. 16-19), Claimant demonstrated that the refusal by the Trustee to deliver the press ordered by Claimant at the original contract price amounted to a breach of that contract, entitling Claimant to assert a claim for damages for such breach in a proof of claim. Claimant further demonstrated that if the original contract between the debtor and Claimant is regarded as an "executory contract" within the meaning of Sections 116(1) and 202 of the Bankruptcy Act, such refusal of the Trustee to perform, together with the District Court's express approval of such refusal, the District Court's statements that the press customers who chose to pay the premium demanded by the Trustee would have the right to file a proof of claim for the premium, and the District Court's entry of an order approving the agreement to complete the presses at an increased price, amounted to a rejection of the original contract and approval of such rejection by the District Court under Sections 116(1) and 202 of the Bankruptcy Act. See Claimant's Main Brief, pp. 18-19.

Although purporting to do so in the point heading of Point I of his brief, the Trustee does not seriously take

issue with Claimant's contention that the Trustee's refusal to complete and deliver Claimant's press at the original contract price amounted to a breach of the original contract. Instead, the Trustee contends that despite the refusal of the Trustee to complete Claimant's press at the original price and the District Court's express approval of that position, Claimant was nevertheless required by reason of Sections 116(1) and 202 of the Bankruptcy Act to make formal application to the District Court for a formal order requiring the Trustee to assume or reject the original contract with Claimant and obtain an order expressly rejecting that contract, before Claimant would be entitled to seek recovery in this proceeding for such breach of contract (see Trustee's Brief, pp. 9-13). As will be demonstrated below, such contention is totally without merit.

Section 202 of the Act confers the status of "creditor" upon persons whose executory contracts with a Chapter X debtor have been rejected "pursuant to the provisions of a plan or *to the permission of the court given in a proceeding under this chapter*" (emphasis supplied). There is nothing in the language of Section 202 which requires that the "permission of the court" take the form of an express formal order of rejection. Such an interpretation would be especially unwarranted in the present case where: (1) the Trustee had indicated to the District Court in a proceeding brought on by order to show cause and affidavit on notice to the other contracting party that he would not assume, but would reject one of the material terms of the contract, to wit, the price; (2) at the hearing on the Trustee's application, the District Court expressly approved such rejection by indicating on the record to the other contracting party that the District Court would not allow the Trustee to perform the contract at the original contract price; (3) the District Court expressly stated on the record that if the other contracting party consented to pay a premium over the original contract price it would have the

right to file a proof of claim for the premium; and (4) the District Court signed an order approving a subsequent agreement requiring the other contracting party to pay a premium in order to obtain delivery. None of the cases cited by the Trustee support his position that an express formal order of rejection is necessary under such circumstances, or otherwise.

Thus, *In re Childs Co.*, 64 F.Supp. 282 (S.D.N.Y. 1944) merely held that there could be no effective rejection of a lease by the trustee's conduct without court authorization, but did not hold that such court authorization must take any particular form. Similarly, in *Texas Importing Co.* v. *Banco Popular*, 360 F.2d 582 (5th Cir. 1966), the Court held that a lease which was rejected in a plan of reorganization could not theretofore have been assumed merely by virtue of the trustee's conduct, absent court authorization. In reaching its decision, the Court noted that rejection may only be ordered after notice and hearing and required "judicial action and decision by the judge". 360 F.2d at 584. Here, again, however, there was no holding that such notice and hearing and "judicial action and decision by the judge" take any particular form. The holding in *In re American National Trust*, 426 F.2d 1059, 1064 is the same as *Texas Importing Co.* case. Once again, no particular form for the requisite "judicial action by the judge" for assumption or rejection is prescribed. *King* v. *Baer*, 482 F.2d 552, 557 (10th Cir.), *cert. denied*, 94 S. Ct. 577 (1973), as pertinent here, held only that "[t]he notice requirements for the rejection of executory contracts require only notice to the parties to such contracts".

The issue in *In re Greenpoint Metallic Bed Co.*, 113 F.2d 881 (2d Cir. 1940), a proceeding under Chapter XI, was whether rejection of an employment contract was accomplished merely by the fact that its assumption had not been provided for in the plan of arrangement. This Court

held that there was no rejection, but ruled that the Referee, upon the claimant's motion prior to confirmation to fix his status under the contract with the debtor, should have ordered the contract to be rejected and fixed a time for proving the claim arising from such rejection. This Court did not hold that a formal order of rejection was required if court permission for such rejection was otherwise manifested, but rather, held that "express provisions of rejection are required to effect the rejection of an executory contract *by the terms of an arrangement.*" 113 F.2d at 884 (Emphasis supplied.) To the same effect is *U.S. Metal Products Co.* v. *United States,* 302 F.Supp. 1263, 1268 (E.D.N.Y. 1969), wherein it was held that no rejection resulted merely by the failure to assume the contract in the Chapter XI plan of arrangement. These cases are not pertinent here, as the rejection in issue is not claimed to be pursuant to a plan of arrangement or reorganization.

At best, the cases cited by the Trustee collectively hold that there can be no rejection of an executory contract without court "permission" after a hearing on notice to the other contracting party. They do not stand for the proposition that such permission must be expressly embodied in a formal order of rejection. As set forth in detail in Claimant's Main Brief (pp. 6-14), it is crystal clear that in the present case such permission was expressly given by the District Court and in fact was recognized and embodied in orders of the District Court. Thus, as set forth, Claimant, along with the other press customers of the debtor, was a respondent in the proceeding commenced by the Trustee by order to show cause dated July 14, 1969 upon the Trustee's proposal to complete the manufacture and delivery of the presses of only those customers who agreed, among other things, to pay a premium over the original contract price. The Trustee thereby in effect applied also for the District Court's permission to reject the customers' contracts under their original price and delivery terms.

Thereafter, at the hearings upon such application by the Trustee, the District Court authorized and permitted such rejection by telling the customers that unless they paid the additional premiums their contracts would not be performed and they would not get delivery.* At the same time, the District Court, recognizing that the Trustee's refusal to perform the customers' contracts under the original terms amounted to a breach of those contracts, stated that the customers who agreed to pay the premium would have the right to file a claim for damages in that amount, thus indicating that no further application to have the Trustee reject the original contract was necessary before proofs of claim could be filed. Further court action was present when the District Court by various orders approved the subsequent agreements between the Trustee and the customers, including Claimant, that agreed to pay the premium.

The foregoing action on the part of the District Court should be regarded as more than sufficient to satisfy the requirement of Section 202 that rejection be had "pursuant * * * to the permission of the court" or, as stated in cases cited by the Trustee, the requisite "judicial action and decision by the judge" (see *Texas Importing Co.* v. *Banco Popular, supra,* 360 F.2d 582 at 584). It would have been a superfluous ritual and unnecessary formality to require Claimant, as the Trustee evidently urges, to make an application to have its contract assumed or rejected. The Trustee could not have assumed the contract, since to do so would have required him to assume it in its entirety—including the original contract price and delivery date—and the Trustee had already indicated that he was unwilling or unable to do so. See, *e.g., In re Italian Cook Oil Corp.,* 190

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* For example, the District Court stated to the press customers, including Claimant:

> If your clients don't want these machines don't take them, don't make the [additional] payment. It is as simple as that. (A 106)

See also A 106, 107.

F.2d 994, 996-97) (3d Cir. 1951); *Schokbeton Industries, Inc.* v. *Schokbeton Products Corp.*, 466 F.2d 171, 176 (5th Cir. 1972); *Johnson* v. *Kurn*, 95 F.2d 626, 633 (8th Cir. 1938). And, as set forth above, the Trustee had already indicated that he would not have the debtor perform the original contract and the District Court had already approved such position. Thus it was totally unnecessary for Claimant to make formal application to have the Trustee assume or reject its contract prior to filing its claim in order to establish Claimant as a "creditor". Rejection, if necessary, had already taken place.

Replying to the Trustee's Brief re Claimant's.

POINT II

Claimant's agreement to pay a premium to the Trustee to complete the contract did not amount to a novation or substituted contract which precluded Claimant from claiming damages for breach of the original contract and Claimant did not thereby elect to waive its right to assert such claim. The District Court erred in so holding.

The only substantive ground for the Trustee's objection to Claimant's claim is that there was a "novation" or modification of the original contract by reason of Claimant's supposed agreement to "renegotiate" the original contract and pay a premium of $177,028 over the original contract price. In Claimant's Main Brief, Claimant demonstrated in detail that the mere fact that Claimant proceeded to perform under a new or altered contract did not, in the absence of a showing by the Trustee of an intention on Claimant's part to waive a right of action therefor, preclude Claimant from recovering damages for the breach of the original contract. See Claimant's Main Brief,

pp. 20-25. Claimant further demonstrated that far from there being an intention on Claimant's part to waive or forego its right of action for damages for breach of its contract, there was in fact an express reservation of such right. As shown, this reservation of rights was recognized by the District Court during the hearings with respect to the Trustee's motion for authority to complete and deliver only those presses of customers who agreed to pay a premium over the original contract prices, but was erroneously ignored by the District Court in its decision. *Id.* at pp. 11-13, 26-30.

In his brief, the Trustee does not purport to set forth any facts to show that Claimant supposedly intended to forego its rights to damages under the original contract other than the entry into what the Trustee describes as a "modified" agreement with the Trustee at an increased price. Nor does the Trustee attempt to refute Claimant's showing that the District Court recognized that by agreeing to pay a premium, Claimant and the other press customers similarly situated would not waive their rights to damages. Instead, the Trustee sets forth a series of irrelevant and unsupported legal "arguments" and combines these with an effort to knock down "strawmen" of his own choosing.

Thus, the Trustee first contends that Claimant seeks to "nullify" certain of the terms of the agreement whereby Claimant agreed to pay $177,028 over and above the original contract price for the press (Trustee's Brief, p. 13). Such contention is an outright misstatement of Claimant's position and misses the point of the instant controversy. Claimant does not seek to nullify any of the terms of such agreement. Indeed, Claimant has fully performed its side of that agreement. Claimant simply maintains and has demonstrated that—contrary to the Trustee's position—the terms of the agreement do not include an agreement on Claimant's part to forego or waive Claimant's right to damages by reason of the Trustee's failure and refusal to

deliver Claimant's press under the original contract at the original contract price.

The Trustee next seeks to amplify the argument made in Point I of his brief by stating that there can be no breach of the original contract without rejection thereof (Trustee's Brief, p. 14). This contention adds nothing to the Trustee's previous argument. Claimant has demonstrated in Point I of this reply brief and at pp. 18-19 of Claimant's Main Brief that there indeed was a rejection of the original contract pursuant to the "permission of the court". While it is readily apparent that rejection of an executory contract amounts to a breach thereof (see Claimant's Main Brief, p. 19), it does not follow, however, that there can be no breach without rejection.

The Trustee's next "strawman" argument is an attempt to establish the indisputable proposition that a written modification of a contract no longer needs consideration. However, as Claimant pointed out in its Main Brief (p. 25), the question of whether any consideration existed or was necessary is irrelevant, since the only real issue is whether the new agreement amounted to a rescission of Claimant's rights under the original contract, including the right to damages for breach thereof.

In an attempt to meet Claimant's factual showing that there was no intent to waive Claimant's right to damages for breach of the original contract and that there was in fact an express reservation of such right that was recognized at the time by the District Court, the Trustee unashamedly makes the feeble contention that the undisputed reservation of what the Trustee characterizes as a "procedural right" to file a proof of claim for breach of the original contract does not evidence non-waiver of the right to damages for such breach (Trustee's Brief, p. 15). The simple answer to this "argument" is that there would have been no need to reserve such "procedural right" if Claimant

and the other press customers had intended to forego their substantive right to such damages. As demonstrated in Claimant's Main Brief, pp. 20-24, Claimant's right to damages for breach of the original contract had already been fixed when such contract was rejected by the Trustee, and could not have been lost absent an expressed intention to waive such right. Such intention cannot be implied merely from performance of a new or altered contract and any such possible implication is expressly negated by the express reservation of such rights herein, which reservation was recognized at the time by the District Court.

The utter weakness of the Trustee's position can be seen from his attempt to advance a newly found argument apparently based on the parol evidence rule. See Trustee's Brief, pp. 15-17. This "argument", which appears to now be the Trustee's principal contention, has never been raised previously by the Trustee in this litigation, either before the Special Master or the District Court. The Trustee now points to the November 3, 1969 order of the District Court approving the agreement by Claimant to pay a premium for delivery (A 32-34) and boldly proclaims "[n]owhere in that order is there any attempt to reserve the right to hold the debtor to the original contract, or preserve a right to damages for the breach of that contract • • •." (Trustee's Brief, p. 15). After citing two cases applying the parol evidence rule, the Trustee then concludes (Trustee's Brief, p. 16):

> Abarta is attempting to convert its clear and unambiguous undertaking in writing to pay an additional amount over the original purchase price into an undertaking to pay this amount while retaining the right to recover it at some future time. This was not the intent of the parties as expressed in the agreement, and regardless of what statements were made by whom in the District Court, the terms of the agreement must prevail.

The Trustee's argument is, to say the least, specious. The parol evidence rule simply can have no applicability to the present situation.

The parol evidence rule provides that when parties have entered into a written contract which is intended to be a complete and accurate integration of that contract, parol evidence of understandings or negotiations will not be admitted for the purpose of varying or contradicting the writing. 3 Corbin, *Contracts* ¶ 573 (1951). See, *e.g.*, *Laskey* v. *Rubel Corp.*, 303 N.Y. 69, 71 (1951); *Hutchinson* v. *Ross*, 262 N.Y. 381, 398 (1933). It is readily apparent that the parol evidence rule has no application here since Claimant is not attempting to vary or contradict the terms of the agreement with the Trustee to pay a premium of $177,028 to obtain completion and delivery of its press. Claimant has fully performed that agreement. By its proof of claim, Claimant is merely asserting its right to damages under the original breached and rejected contract —rights which accrued prior to the entry into the agreement to pay a $177,028 premium. By asserting that the Claimant was required to expressly provide in the subsequent agreement that it was retaining the right to recover such premium at some future time, the Trustee is in effect stating that the burden is not upon the Trustee to show waiver, but rather, on Claimant to show non-waiver. However, as shown in Claimant's Main Brief, pp. 21-22, the law is diametrically to the contrary. This is quite apart from the fact that Claimant has also made a detailed showing of non-waiver. See Claimant's Main Brief, pp. 26-30.

In the second place, the documents to which the Trustee refers as embodying the agreement between the parties, to wit, the order of the District Court entered on November 3, 1969 (A 32-34) and the petition of the Trustee for such order (A 37-39) do not purport to be a complete integration of the agreement between the parties. Indeed, the Trustee conveniently overlooks the fact that the very order

of November 3, 1969 expressly recites by its very terms that it is based *"upon all proceedings and hearings heretofore had by this Court"* (A 32-33) (emphasis supplied), thereby incorporating by reference into the November 3, 1969 order such prior hearings and the transcripts thereof. Such prior "proceedings and hearings" of course include the hearings on the Trustee's original order to show cause which resulted in the July 22, 1969 order, at which the District Court specifically stated that by agreeing to pay a premium the press customers would not thereby waive their right to claim damages for breach of the original agreement. Indeed, the record of such "prior proceedings and hearings" also shows that the District Court induced the press customers not to insist on a non-waiver provision in the District Court's order, by stating that "it [non-waiver] is on the record as far as I remember for our last three meetings" (A 12). See Claimant's Main Brief, pp. 11-13, 27-30.

Finally, regardless of whether the previous hearings were incorporated by reference in what the Trustee claims was the agreement between the parties, it would be the height of inequity if the preservation of Claimant's rights to damages for breach of contract were to be lost because Claimant relied upon assurances by the District Court itself on the record that there was no waiver by reason of the agreement to pay a premium and specifically that no non-waiver provision would be necessary in the Court's order. It is well established that a bankruptcy court, such as the District Court administering the reorganization of the debtor here, is a court of equity and applies equitable principles. See, *e.g.*, *Bank of Marin* v. *England*, 389 U.S. 99, 103 (1966), *United States National Bank* v. *Chase National Bank*, 331 U.S. 28, 36 (1946), *Pepper* v. *Litton*, 308 U.S. 295, 304 (1939). An agreement with the Trustee is to be regarded as an agreement with the Court. See, *e.g.*, *In re Hollingsworth & Whitney Co.*, 242 Fed. 753, 756-57 (1st Cir. 1917). As shown, the record in this proceeding in

many places embodies the District Court's express statements that there would be no waiver. See, *e.g.*, A 99-100, 111-12, 113, 114, 124-25, 149. The Trustee and/or his attorneys were present when such statements were made by the District Court. It thus ill behooves the Trustee to now blandly argue as he does in his brief (p. 16) that "regardless of what statements were made by whom in the District Court, the terms of the agreement must prevail". Quite apart from the other defects in such contention, at the very least, the Trustee should be estopped from taking such position.

Finally, the most glaring deficiency in the Trustee's memorandum on this point is that there is no attempt whatsoever to distinguish any of the cases relied upon by Claimant, except the case *United States Navigation Co.* v. *Black Diamond Lines, Inc.*, 124 F.2d 508 (2d Cir. 1942), *cert. denied.* 315 U.S. 816 (1942), as to which the distinction attempted to be drawn by the Trustee is no distitnction at all. See Claimant's Main Brief, pp. 23-24. The passage from the *United States Navigation* case quoted by the Trustee at page 17 of his brief to the effect that despite new contracts calling for only part of the performance required by the original contracts "[t]hose contracts were at least not wholly rescinded", 124 F.2d at 511, was included in this Court's opinion in that case as further support for this Court's conclusion that absent a rescission of the original contracts, there remained a right to damages for breach of the original contracts. See 124 F.2d at 511. As demonstrated, this Court found that there was no such "rescission or an agreement to rescind implicit in the [new contracts]". *Ibid.* Thus, the Trustee has utterly failed to refute or distinguish any of the cases cited by Claimant (Main Brief, pp. 21-22) for the proposition that where there is a breach of contract, the mere fact that a party proceeds to perform under a new or altered contract does not, in the absence of an intention on his part to waive a right of action there-

for, preclude him from recovering for breach of the original contract.

Moreover, the two cases relied upon by the Trustee are not in point. Thus, in *United States, ex rel. Int'l Contracting Co.* v. *Lamont*, 155 U.S. 303 (1894), unlike the present case, there was a serious dispute as to the validity of the original contract. As noted by this Court in the *United States Navigation Co.* case in distinguishing the *Lamont* case, "[i]t was doubtful * * * whether the first contract was binding at any time." 124 F.2d at 510. Thus, the Supreme Court in *Lamont* was understandably reluctant to allow the use of the extraordinary writ of mandamus to compel the Secretary of War to execute a formal contract at the higher price called for by the first contract. Moreover, in the *Lamont* case, there was no court recognition of nonwaiver of the right to damages under the original contract such as is present in the instant case. The case of *Stanspec Corp.* v. *Jelco, Inc.*, 464 F.2d 1184, 1187 (10th Cir. 1972) furnishes even less support for the Trustee. There, not only was there a dispute as to the existing duties under the first contract, but the second contract was found to have been "an agreed compromise of the dispute" 464 F.2d at 1186, and the second contract was agreed to by defendant after there was a rejection by plaintiff of defendant's attempt to specifically reserve its rights under the first contract.

In sum, the Trustee's contention of "novation" or modification involving a discharge of Claimant's right to damages for breach of the original contract is totally without merit.

Replying to the Trustee's Brief re Claimant's.

POINT III

Claimant's agreement to pay a premium in order to obtain completion and delivery of its press was the result of economic duress and Claimant is therefore entitled to recover the premium.

In its Main Brief, Claimant demonstrated that on the basis of the undisputed facts, each of the three elements of economic duress set forth by the New York Court of Appeals in the definitive case of *Austin Instrument, Inc.* v. *Loral Corp.*, 29 N.Y.2d 124, 130 (1971) was present when Claimant agreed to pay a premium of $177,028 over the original contract price in order to obtain completion and delivery of its press, thus furnishing an additional basis for the allowance of Claimant's claim. See Claimant's Main Brief, pp. 31-36. The Trustee in his brief advances two arguments in opposition.

First, the Trustee contends that his threatened breach of contract could not constitute wrongful conduct constituting economic duress, since Bankruptcy Act § 116(1) permits the rejection of an executory contract by the Trustee with permission of the Court and hence, the argument goes, neither a threat to reject nor a Court authorized rejection of the contract herein could constitute wrongful conduct. Trustee's Brief, pp. 19-20. This contention cannot withstand scrutiny.

When an executory contract is rejected pursuant to Section 116(1) of the Bankruptcy Act, such a rejection constitutes a breach of contract which a claimant is entitled to assert. See Bankruptcy Act § 63c. See also, *In re United Cigar Stores Co.*, 89 F.2d 3 (2d Cir. 1937); 6 Collier, *Bankruptcy* § 3.24(1) (14th ed. 1972). Under Section 202 of the Bankruptcy Act, the claimant then becomes a cred-

itor of the debtor entitled to file a proof of claim for damages resulting from the breach of contract. See *In re Maryvale Community Hospital, Inc.*, 456 F.2d 414 (9th Cir. 1972); *In re American National Trust*, 426 F.2d 1059 (7th Cir. 1970); *In re Huyler's*, 107 F.Supp. 318, 323 (S.D.N.Y. 1952), *aff'd* 204 F.2d 502 (2d Cir. 1953). In the present case the Trustee and the District Court indicated that Claimant would not receive delivery of the press unless Claimant agreed to pay a price higher than the contract price. As shown above, pp. 5-6, *supra*, this constituted a rejection of Claimant's contract with the debtor and gave Claimant the status of a creditor with a provable claim for damages against the debtor.

Since rejection constitutes a breach, it logically follows that the threat of rejection was the threat of a breach. The consequences of such breach—an action or claim for damages—are the same whether or not breach takes place in a reorganization proceeding pursuant to a court authorized rejection. The threat of such a breach unless the other party agrees to more onerous terms is no less wrongful if it is characterized as a threat to reject. Such a threat is not made rightful by reason of the fact that the Bankruptcy Act gives the Trustee the *power*, with court permission, to reject an executory contract, since under basic principles of legal analysis a party always has the *power*, as distinguished from the *right*, to breach its contract. In neither instance is there a "right" to breach without the payment of damages. Thus, the Trustee's "rightful threat of rejection" argument cannot stand.

The Trustee's second argument is that the ordinary remedy for an action for breach of contract would not be adequate because "[t]here is no assertion that a press capable of printing Abarta's newspaper could not be obtained elsewhere, nor any evidence that delay in obtaining such a press would result in Abarta's inability to publish in the interim". Trustee's Brief, pp. 20-22. Such a contention

ignores the following undisputed facts:

1. The Colormatic press ordered by Claimant and eventually manufactured by the debtor contained features that were different from presses made by other press manufacturers and Claimant would not have been able to obtain a press with the same features from any such other manufacturer (A 146).

2. The press ordered by Claimant was custom made and the average delivery time for a press of the size and type ordered was approximately one year from the date the contract for such a press was signed (A 146).

3. At the time the debtor petitioned this Court for proceedings under Chapter X of the Bankruptcy Act, Claimant had paid the debtor $596,041.20 of the total purchase price of the press of $836,679 (A 145, 147).

Thus, the undisputed proofs show that Claimant could not have received a press similar to the one it ordered from the debtor from another source of supply. Even if such a press were available, it would have entailed another year's wait from the time a new contract was signed to receive it. And, finally, had Claimant not agreed to pay a premium for delivery, it would have been relegated to filing a claim for breach of contract for non-delivery and return of the $596,041.20 already paid. Since the money already paid was not segregated by the debtor or held as a "trust fund" it was highly unlikely that Claimant could reclaim such money. Instead, Claimant would merely have a general claim to assert against the debtor which was on the verge of an adjudication in bankruptcy (see A 23, 91, 95-96, 147).

Under such circumstances it is clear that Claimant had no adequate remedy at law when it acceded to the Trustee's demand that it pay a premium of $177,028.00 and prepay the unpaid balance of the original contract price. When

viewed in this light, the cases cited by the Trustee at page 21 of his brief to the effect that a contract entered into under the pressure of financial circumstances will not be voided for duress are totally inapposite. Claimant, like the plaintiff in *Austin Instrument*, was forced to pay a premium for what the District Court characterized as "its much needed equipment" (A 157) necessary to sustain its competitive existence, and here, as in *Austin Instrument*, Claimant should be allowed to recover the coerced premium.

Replying to the Trustee's Brief re Claimant's.

POINT IV

Claimant's claim should properly have been allowed as an administration claim.

The Trustee in his brief does not purport to refute Claimant's showing that its payment of a premium over and above the original contract price constituted an actual and necessary expense of preserving the estate of the debtor subsequent to the filing of the petition herein and that under the applicable authorities such claim should be allowed as an administration claim. Rather, the Trustee attempts to argue that by reason of the fact that those customers who chose to pay a premium and who received trustee's certificates as security for non-delivery would have been entitled to prove as administrative claimants had there been non-delivery, they are therefore precluded from proving as administrative claimants by reason of the fact that they ultimately did receive delivery. See Trustee's Brief, pp. 22-23. Such contention is a logical nonsequitur.

Indeed, the District Court itself recognized the fact that delivery at the increased price and return of the trustee's certificates would not necessarily exclude the assertion of a

claim to recover the amount of the premium as an administration expense. Thus, the District Court stated:

> But *even if you turn back that certificate* [upon delivery], they would still have a claim, whether or not it would be sustained or not, *as an administration claim,* they would still have a general claim, whether or not it would be sustained or not, a general claim as to additional amounts to be paid to get the machine over and above the contract price. That is my understanding of the law. (A 22) (Emphasis supplied.)

As can be seen, the District Court did not purport to exclude the possibility that Claimant's claim could be considered an administration claim if such claim fulfilled the statutory and decisional requirements therefor. As set forth in Claimant's Main Brief, pp. 36-39, the additional moneys paid by Claimant and the press customers furnished the working capital which enabled the debtor to continue in business. Claimant's claim satisfies all applicable requirements for an allowable administration claim.

Conclusion

The order of the District Court disallowing and expunging Claimant's claim should be reversed and the claim should be allowed in full as an administration claim or, alternatively, as a general creditor's claim.

Respectfully submitted,

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Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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R. HOE & CO., INC.,

Debtor.

ABARTA CORP. (d/b/a PRESS PUBLISHING CO.),

Claimant-Appellant,

against

JAMES B. KILSHEIMER, III and ROBERT M. CORRAO, as Trustees,

Appellees.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 6th day of September, 1974, he served two copies of Appellant's Reply Brief on Winthrop, Stimson, Putnam & Roberts, the attorneys for Appellees by delivering to and leaving same with a proper person in charge of their office at 40 Wall Street in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this

6th day of September, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976